Meton Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — TAX APPEAL NO R1-14-4 OF 1994
ABDUL KADIR SULAIMAN J
3 DECEMBER 1997

Administrative Law *— Rules of natural justice — Income Tax — Special Commissioner disposed of appeal in absence of appellant — Appellant alleged non-receipt of notice of hearing — Whether there must be evidence that party absenting from proceedings was aware of such proceedings — Whether special commissioner was in breach of the fundamental rule of justice — Income Tax Act 1967 Schedule 5, paras 13, 17(1)(b) & 18*

Revenue Law *— Income Tax — Procedure — Special Commissioner disposed of appeal in absence of appellant — Appellant alleged non-receipt of notice of hearing — Whether there must be evidence that party absenting from proceedings was aware of such proceedings — Income Tax Act 1967 Schedule 5, paras 13, 17(1)(b) & 18*

This was an appeal by way of case stated by the appellant against the decision of the special commissioner of income tax dismissing the appellant's appeal and affirming the additional assessment notice of the respondent to the appellant. The special commissioner disposed off the appeal by relying on the records tendered by the respondent in the absence of the appellant or their representative. The reason given by the appellant for the absence at the hearing before the special commissioner was that the appellant never received the notice of the hearing.

Held, setting aside the decision of the special commissioner:

Pursuant to para 17(1)(b) of Schedule 5 to the Income Tax Act 1967, there must first be evidence that the party absenting itself from the proceedings was aware of it but for his own reason fails to attend such proceedings. In the present case, it was not disclosed whether the notice of the hearing of the appeal was ever sent to the appellant or their representative to impute knowledge on their part. Therefore, it could not be assumed that, the appellant being notified of the date of the hearing of the appeal, chose not to be present. In the circumstances, it was wrong on the part of the special commissioner to have proceeded on with the hearing of the appellant's appeal in their absence. For that reason, the procedure adopted by the special commissioner was not correct in law as being in breach of the fundamental rule of justice. Therefore, the proceedings before the special commissioner resulting in the deciding order dismissing the appeal of the appellant was illegal and therefore a nullity (see pp 435C–D, F–G, 436F–G).

[Bahasa Malaysia summary

Ini adalah rayuan melalui kes yang dinyatakan oleh perayu terhadap keputusan pesuruhjaya khas cukai pendapatan mengketepikan rayuan perayu dan mengesahkan notis penaksiran tambahan responden kepada perayu. Pesuruhjaya khas melupuskan rayuan dengan bergantung kepada rekod-rekod yang dikemukakan oleh responden

semasa ketidakhadiran perayu atau wakil mereka. Alasan yang diberikan oleh perayu kerana tidak menghadiri perbicaraan di hadapan pesuruhjaya khas adalah kerana perayu tidak menerima notis perbicaraan tersebut.

Diputuskan, mengketepikan keputusan pesuruhjaya khas:

Menurut para 17(1)(b) Jadual 5 Akta Cukai Pendapatan 1967, mesti pertamanya terdapat keterangan bahawa pihak yang tidak menghadirkan diri dalam prosiding-prosiding menyedari mengenainya tetapi dengan alasan sendiri gagal menghadiri prosiding-prosiding berkenaan. Dalam kes ini, adalah tidak dinyatakan sama ada notis mengenai rayuan perbicaraan tersebut pernah dihantar kepada pemohon atau wakil mereka untuk mengatakan terdapat pengetahuan di pihak mereka. Oleh itu, tidak boleh diandaikan bahawa perayu yang telah diberitahu mengenai tarikh perbicaraan rayuan memilih untuk tidak menghadirinya. Dalam keadaan ini, adalah salah di pihak pesuruhjaya khas untuk meneruskan perbicaraan rayuan perayu tanpa kehadiran mereka. Atas alasan ini, prosedur yang dipakai oleh pesuruhjaya khas adalah salah di sisi undang-undang sebagai melanggar peraturan asas keadilan. Oleh itu, prosiding-prosiding di hadapan pesuruhjaya khas yang membawa kepada keputusan mengketepikan rayuan perayu adalah menyalahi undang-undang dan dengan itu adalah batal (lihat ms 435C–D, F–G, 436F–G).]

Notes

For cases on breach of natural justice generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 557–662.

For cases on income tax generally, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1674–1917.

Cases referred to

Noble v Wilkinson (HM Inspector of Taxes) 38 TC 135 (refd)

PQR v The Comptroller of Income Tax, Singapore [1961] MLJ 273 (refd)

Legislation referred to

Income Tax Act 1967 Schedule 5, paras 13, 17(1)(b), 18

Abdul Kadir Sulaiman J: This is an appeal by way of case stated by the taxpayer, Meton Properties Sdn Bhd against the decision of the Special Commissioners of Income Tax made on 22 October 1994, dismissing their appeal to them and affirming the additional assessment notice of the respondent to the appellant dated 20 December 1986, calling for the appellant to pay additional tax of RM205,961 for the year of assessment 1984. This amount of tax levied arose out of compensation money paid by Solar Movie Enterprise (M) Sdn Bhd ('Solar')to the appellant to the tune of RM250,000 for the premature release of Solar from due performance and observance of its obligation under an agreement it entered with the appellant on 15 June 1979, which in this judgment will be referred to as the

first agreement for the sake of convenience. The provisions for the release of Solar from its obligation under the first agreement is contained in an agreement made between the parties on 19 October 1983, which hereinafter will be referred to as the second agreement. A

The issue before the Special Commissioners was whether this sum of RM250,000 paid by Solar to the appellant pursuant to the second agreement is a capital receipt or an income receipt. By their deciding order of 22 October 1994, they decided that the said sum of RM250,000 in the hand of the appellant is not a capital receipt and therefore, the amount is subject to tax. Consequently, they dismissed the appeal and confirmed the assessment so made by the respondent. They disposed off the appeal of the appellant to them by relying on the records tendered by the learned counsel for the respondent in the absence of the appellant or their representative. There was also no oral evidence offered by the respondent. The documents tendered were the statement of facts (exh A) and the bundle of documents (exh B). The Special Commissioners proceeded with the hearing of the appeal in the absence of the appellant after having considered the provisions of paras 13 and 17(1)(b) of Sch 5 to the Income Tax Act 1967 ('the Act') and on the authority of *PQR v The Comptroller of Income Tax, Singapore* [1961] MLJ 273 and *Noble v Wilkinson (HM Inspector of Taxes)* 38 TC 135. B C D

In this appeal by the appellant to the High Court by way of a case stated, having laid out the facts as found by them based on the documents so tendered by the respondent, the Special Commissioners sought the opinion of this court based on the following questions: E

(a) whether the procedure adopted by them is correct in law; and

(b) whether on the facts found by them their decision is correct in law.

Before I deal with the merits of the appeal based on the facts as so found by the Special Commissioners covered by question (b) above, I will first deal with the issue in question (a). If the answer to that question is in the negative, it will no longer be necessary for me to deal with the answer to the said question (b). By the first question posed by the Special Commissioners, I take it that they wanted to know whether hearing the appeal in the absence of the appellant in the circumstances is allowed by law. Before me, this issue of the absence of the appellant on the date of the hearing of the appeal by the Special Commissioners was never specifically raised by the appellant in the counsel's main submissions. It was only the respondent in their reply to the main submissions made by the appellant who touched on the matter by submitting that the decision of the Special Commissioners was made in the absence of the appellant. In his final reply, the learned counsel for the appellant gave the reason for the absence of the appellant at the hearing before the Special Commissioners. The reason being that the appellant never received the notice of the hearing. He referred to the affidavit of Chow Wai Peng for the appellant in support of a separate application in the High Court filed by the appellant on 2 February 1996, to have the case stated remitted back to the Special Commissioners for a re-hearing or for the Special Commissioners to find further facts and state a supplementary case. One of the grounds in that application being that the appellant or their tax agent never received any notification in respect of the hearing of the appeal fixed before the Special Commissioners. This separate application was F G H I

dismissed by the court on 8 March 1997, on the ground that the said application was wrongly made in the High Court when such application by virtue of para 18 of Schedule 5 to the Act ought to have been made to the Special Commissioners because it was so made after a deciding order has been made by the Special Commissioners. The appellant did not appeal against that order of dismissal by the High Court. In this present hearing of the appeal before me now, apart from giving the reason for the absence of the appellant, the learned counsel did not pursue any further the matter but proceeded on to argue on the merits of the appeal. Be that as it may, in light of the question posed by the Special Commissioners on this issue for the reason they decided to hear the appeal in the absence of the appellant, an answer has to be provided.

Paragraph 17(1)(b) of Schedule 5 to the Act concerns the failure to attend by a party to an appeal before the Special Commissioners, either personally or by a representative at the time and place fixed for the hearing of the appeal. For the paragraph to apply there must be first the evidence that the party absenting itself from the proceedings was aware of it but for his own reason fails to attend such proceedings. However, in the present case, from the case stated it is not disclosed whether the notice of the hearing of the appeal was ever sent to the appellant or their representative to impute knowledge on their part of the proceedings to take place before the Special Commissioners on 5 August 1994. It merely states that this appeal was scheduled for hearing on 5 August at 9 am. Neither the appellants nor their representatives were present though the respondent was represented by Senior Federal Counsel. The matter was stood down till 9.15am but when they sat at 9.15 am the appellants were still not present nor had they communicated with the Commissioners or the respondent to explain their absence. Then the learned Senior Federal Counsel for the respondent applied for the appeal to be dismissed and tendered a statement of facts. The Commissioners after having deliberated over the matter, dismissed the appeal and confirmed the assessment made by the respondent.

Therefore, in light of the submissions in reply made by the learned counsel for the appellant before me now, it cannot be assumed that the appellant being notified of the date of the hearing of the appeal chose not to be present. In further support of their action to hear the appeal in the absence of the appellant, the Special Commissioners, according to the case stated, relied on the dictum of Buttrose J in the Singapore Court of Appeal decision of *PQR v The Comptroller of Income Tax, Singapore* [1961] MLJ 273. In that case, at the hearing before the Board of Review the taxpayer did not give evidence and was not present throughout the proceedings. However, at the hearing he was represented by an accountant and the only witness called on his behalf was his nephew. There lies the difference in the scenario between this case of the present appellant and that of the cited case. There the appellant was present, being represented by his accountant, and evidence was given on his behalf by his nephew. However, in this case, neither the appellant nor their representative was present at all before the Special Commissioners. Therefore, it is not right for the Special Commissioners to rely on the dictum of Buttrose J in that case cited in order to justify their action of disposing off the appeal in the absence of the appellant. Buttrose J said at p 275:

> It was urged on behalf of the taxpayer, as I understood it, that the Board of Review should have required his attendance before it. There is, in my view, no substance in the point. This was an appeal by the taxpayer against these additional assessments and the onus of proving they were excessive lay on the taxpayer. If he did not consider it necessary himself to give evidence in discharge of that onus that was entirely a matter for him.

The Special Commissioners also relied on *Noble v Wilkinson (HM Inspector of Taxes)* 38 TC 135. In that case, the appellant appealed to the Commissioners for the General Purposes of Income Tax for the Division of Tindale Ward in the County of Northumberland against an estimated assessment to income tax raised upon him. On the day of the hearing of the appeal there was no personal attendance by or on behalf of the appellant. However, on the morning of and shortly before the time of the meeting of the Commissioners, the clerk received a letter from the counsel for the appellant seeking for an adjournment of the proceedings and indicating that they did not propose to attend the proceedings in person 'unless you consider it is necessary in which event we shall be glad if you will please telephone the writer before the meeting'. The clerk stated that he had not read this letter before the meeting and requested for instructions from the Commissioners. This is what the Commissioners said at p 136:

> We considered that it was the duty of Messrs EWS Portnell & Sons to decide whether it was necessary in the interests of their client for them to attend and that having been given due notice of the meeting it was not for us to require their attendance by telephone.

There again the factual situation is different from the situation existing before the Special Commissioners on that day. The appellant there was aware of the proceedings to take place that day but chose not to appear. In this case, there is no such evidence to be gathered from the case stated. In the circumstances, as stated earlier, it was wrong on the part of the Special Commissioners to have proceeded on with the hearing of the appellant's appeal in their absence. For that reason, the answer to question (a) above is that the procedure adopted by the Special Commissioners is not correct in law as being in breach of the fundamental rule of justice. In the circumstances, the proceedings before the Special Commissioners on 5 August 1994, resulting in the deciding order dismissing the appeal of the appellant and confirming the assessment made by the respondent was illegal and therefore, a nullity. In the circumstances, I have no alternative but to set aside the said deciding order of 22 October 1994 and make an order that the appeal by the appellant before the Special Commissioners be reheard before different Special Commissioners.

In light of the said order, it is no longer necessary for me to deal with the merits of the appeal and to decide whether on the facts found by the Special Commissioners, their decision is correct in law.

Order accordingly

Reported by Jafisah Jaafar